Kerr-McGee Chemical Corporation *and* United Steelworkers of America, AFL–CIO–CLC, Petitioner. Case 26–RC–7473

May 28, 1993

DECISION AND ORDER REMANDING PROCEEDING

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The issues in this case are whether the Regional Director correctly (1) sustained the Petitioner's Objection 1, which alleges that the Employer engaged in improper polling of employees through its distribution of ''Vote No'' buttons and decals, and (2) recommended a hearing on substantial and material issues of fact raised by the Petitioner's Objection 3, which alleges that two employees, with employer knowledge, wore ''radically provocative head gear with a message on it and their pictures were taken.''

The National Labor Relations Board, by a three-member panel, has considered the above objections to the election held September 10, 1992, and the attached Regional Director's report recommending disposition of same. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 62 for and 95 against the Petitioner, with 10 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and affirms the Regional Director's findings and recommendations, except that the Board is of the view that the Petitioner's Objection 1 also raises substantial and material issues warranting a hearing.[1]

1. In directing a hearing on Objection 1, we note initially that the Petitioner had no reason to complain to the Board about not receiving a hearing on this objection because the Regional Director had sustained the objection and found it a sufficient ground for setting aside the election. The Regional Director had also alternatively suggested that the Board might find that Objection 1 raised material issues of fact which warrants a hearing. Therefore, contrary to our dissenting colleague, we see no significance in the fact that the Petitioner has not asked us to direct a hearing on the objection.

With respect to whether a hearing is warranted, we note that, as Member Oviatt's own opinion reveals, there are rather fine factual distinctions between cases in which offering employees vote no campaign material designed to be publicly displayed on the employees' clothing is deemed sufficiently close to polling employee sentiment to have a reasonable tendency to coerce and those in which offers of such material are deemed noncoercive. The investigation revealed that vote no buttons and decals were distributed to 30 different supervisors with instructions that each distribute them to his or her crew, and the crews appear to be small. In our view, a hearing will aid us in determining on which side of the line drawn by our case law this case falls.

2. Our colleague makes certain observations predicated on his assumption that the Union made a typographical error in its objections' letter with respect to a matter now subsumed under Objection 3. We do not know whether the particular word in question was a typographical error, but we agree with our colleague that any evidence that appears to come within the general scope of the objection may properly be considered at the hearing.

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 26 to arrange for a hearing on the issues raised by the Petitioner's Objections 1 and 3, and to give notice of the hearing.

IT IS FURTHER ORDERED that a hearing officer be designated to conduct a hearing and prepare a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections. Within 14 days from the issuance of such report, either party may file with the Board an original and seven copies of exceptions. Immediately upon the filing of such exceptions, the party shall serve a copy on the other party and shall also file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.

MEMBER OVIATT, dissenting in part and concurring in part.

Contrary to my colleagues, I would not remand Objection 1 to the Regional Director for an evidentiary hearing. Rather, I would reject the Regional Director's recommendation that Objection 1 be sustained, and I would overrule it on the basis of the record now before us, the sufficiency of which is neither questioned by the Regional Director nor challenged by either party.

In agreement with my colleagues, I would remand Objection 3 to the Regional Director for an evidentiary hearing. In addition, I believe that there are particular factual issues that the hearing should include at a minimum.

1. Objection 1

In Objection 1, the Union alleges that:

> The Company conducted polling of unit Employees by supervisors within the departments. Em-

[1] The Regional Director approved the Petitioner's withdrawal of the remaining objections.

> ployees were ask[ed] if they were (1) for the union, (2) against the Union or (3) undecided.

As discussed below, this asserted polling is alleged to have occurred in the context of supervisors providing antiunion election campaign materials (vote no buttons and stickers) to unit employees. The Employer has excepted to the Regional Director's recommendation that this objection be sustained, and my colleagues have decided to remand the objection to the Regional Director for an evidentiary hearing.

I disagree with the Regional Director's substantive recommendation that the Union's Objection 1 be sustained, and I also disagree with my colleagues' procedural decision that it be remanded to the Regional Director for an evidentiary hearing.

a. *Procedure*

Procedurally, I would decide the issue raised by Objection 1 now, without a hearing, on the basis of the record before us (i.e., the Regional Director's Report on Objections and the attachments thereto, the Employer's exceptions and the attachments thereto, and the Employer's brief in support of exceptions).[1]

Under the Board's Rules and Regulations applicable to circumstances like these, the Board may direct that an evidentiary hearing be held if it appears to the Board that exceptions to the Regional Director's Report on Objections raise substantial and material factual issues.[2]

Applying that standard to the instant circumstances, I see no reason for us to direct an evidentiary hearing. No one has asked for a hearing on this objection. More importantly, no one—not the Employer, not the Union, not the Regional Director—has questioned the material accuracy, consistency, or sufficiency of the evidence summarized in the Regional Director's report and contained in the affidavits attached to the Employer's exceptions.[3] Thus, neither the Regional Director's Report on Objection 1 nor the Employer's exceptions to the report raise any substantial and material factual issues. Indeed, in remanding this objection for an evidentiary hearing, my colleagues do not refer with particularity to any such issues. In the absence of appropriate grounds for remanding Objection 1 for an evidentiary hearing, I would not do so.

b. *Substance*

Substantively, I find, contrary to the Regional Director's recommendation, that the record fails to establish that the Employer has engaged in the objectionable conduct alleged in Objection 1, and I would, therefore, overrule this objection on the merits. The facts are essentially as follows.

On September 2, 1992,[4] about a week before the election, the Employer distributed a supply of vote no buttons and hardhat stickers to each of 30 supervisors, together with written instructions to the supervisors on what they were to do with these materials. The instructions stated in pertinent part that:

> I am also providing [buttons and stickers] for the members of your crew who may want them. It is important, however, that you know how these are to be distributed.
>
> As a group, you should tell your crew that these materials are available for those employees who may want them. This should be done in a neutral area such as control room or lunchroom, not in your office. YOU SHOULD NOT HAND THEM TO YOUR EMPLOYEES as this could be viewed to be polling and coercive behavior. After making them available to the group you should NOT closely monitor who picks the materials up and who does not. Simply make them available. [Emphasis in original.]

Supervisors Wells, Rieves, Danner, and Harlow provided affidavits about what they did with these materials.[5]

Wells called the eight members of his crew to the breakroom. After they arrived, he put the buttons and stickers on a table and told them ''[t]here are some buttons and stickers, if anybody wants more I can get them.'' He then left the breakroom. He did not see anyone take a button or a sticker.[6] He did not ask any member of his crew to wear a vote no button or sticker. He does not recall whether he was wearing a vote no button or sticker when he made the buttons and stickers available to the members of his crew.

Rieves entered the employee lunchroom shortly after the lunch hour, while members of his eight-person crew were seated there. He ''dumped'' the buttons and stickers on a table and said, ''Here are some buttons if anybody wants one.'' He then left the lunchroom. He did not look to see if any of the employees picked up any buttons or stickers. He was wearing a vote no button on his shirt and ''probably'' a vote no sticker

[1] Sec. 102.69(g)(1)(ii) and (3), the Board's Rules and Regulations.

[2] Sec. 102.69(f).

[3] The Union has filed no exceptions to the Regional Director's report and no answer to the Employer's exceptions. The Employer itself only challenges the correctness of the Regional Director's recommended sustaining of Objection 1 on the grounds that, under Board precedent, the facts do not support the Regional Director's recommendation.

[4] All dates are 1992 unless otherwise stated.

[5] There is no evidence in the record from any of the other 26 supervisors who received these materials.

[6] An employee (not identified in the Regional Director's report) said that two members of Wells' crew took buttons and stickers. There is no evidence that Wells saw this.

on his hardhat when he made the buttons and stickers available to the members of his crew. He did not ask any employee to wear a vote no button or sticker. He does not know whether any of the members of his crew wore any of the buttons that he put on the table.

Danner went into the breakroom while ''a number'' of the eight members of his crew were on break there. He went to a table away from where the employees were seated and ''dumped'' the buttons on the table. He then left the breakroom. He did not say anything and no one said anything to him. He did not ask any member of his crew to wear a vote no button or sticker. He was not wearing a vote no button or sticker when he made the buttons and stickers available to the members of his crew.

Harlow went into the breakroom while all 10 members of his crew were on break there, seated at 2 tables that had been pushed together. He put the buttons and stickers at the end of one of the tables. According to one of the members of Harlow's crew, Harlow said, ''Here are some buttons for the people that want them.''[7] Harlow then left the breakroom. He did not see anyone take a button or sticker. He was wearing a vote no sticker on his hardhat when he made the buttons and stickers available to the members of his crew. He did not ask any employee to wear a vote no button or sticker.

That is all the substantial and material evidence in regard to Objection 1. It is essentially uncontroverted and internally consistent.

In recommending that Objection 1 be sustained, the Regional Director relied on *Macklanburg-Duncan Co*., 179 NLRB 848 (1969), and *Chas. V. Weise Co*., 133 NLRB 765 (1961), both of which are discussed below. The Regional Director found in pertinent part that:

> Here, as in *Macklanburg-Duncan* and *Weise*, there is direct supervisory involvement in the distribution of anti-union materials which called upon employees to openly display a preference. . . . The crew members were known personally to the supervisors and knowledge of which crew members accepted and which did not accept the offer of the materials could become readily known to the supervisors. This evinced an intent to poll.

The Regional Director's analysis has, in my view, missed the mark in three fundamental ways.

First, contrary to the Regional Director's assessment, the record completely fails to show that the manner in which the vote no buttons and stickers were distributed in this case ''called upon employees to openly display a preference.'' Quite to the contrary, the uncontroverted evidence clearly establishes that the employees were decidedly *not* placed in that position at the time the buttons and stickers were made available to them. Thus, the supervisors uniformly said, without contradiction, that after placing the buttons and stickers on the tables in the presence of the employees, they did not ask anyone to take any buttons or stickers, they immediately left the room, and they did not see whether anyone actually took any buttons or stickers. Nor is there any evidence that the supervisors even affirmatively *offered* any buttons or stickers to anyone beyond simply putting them on a table in front of the employees. They simply told the employees that the buttons and stickers were there for anyone who wanted them and then left without further ado. Clearly then, not only does the uncontroverted evidence fail to support the Regional Director's finding that the employees were ''called upon'' under these circumstances to openly display a preference by accepting or rejecting the material, the evidence instead undermines that finding.

Second, the record also fails to support the Regional Director's finding that ''knowledge of which crew members accepted and which did not accept the offer of the materials could become readily known to the supervisors.'' As seen above, the uncontroverted evidence is that the supervisors left the room immediately after placing the buttons and stickers on the tables in the presence of the employees, without asking anyone to take anything, without affirmatively offering any of the materials to any individual, and without seeing who, if anyone, took anything. Thus, there is simply no basis in the record for the Regional Director's finding that the supervisors could readily find out under these circumstances which employees took any of the buttons or stickers.

Third, there is also no support in the record for the Regional Director's finding that the supervisors' manner of making the buttons and stickers available to the employees ''evinced an intent to poll.'' Again, the evidence is directly to the contrary. In written instructions from the Employer, the supervisors were expressly warned not to engage in specific conduct: conduct that could amount to polling. There is nothing in the record to even hint that these instructions were a sham, or anything less than what they appear on their face to be. Indeed, the evidence is that the Employer's instructions not to poll were meant to be followed, and that they were in fact followed. Contrary to the Regional

[7] Harlow, himself, alleged that he did not say anything. I do not find that this discrepancy on this narrow evidentiary point raises a ''substantial and material factual issue'' warranting a remand for an evidentiary hearing. Rather, for purposes of my analysis, I will assume for the sake of argument that when Harlow placed the buttons and stickers on the table he said, ''Here are some buttons for the people that want them.'' Resolution of this immaterial discrepancy against Harlow, however, does not undermine my finding that the record fails to establish a prima facie case that the Employer engaged in the objectionable conduct alleged in Objection 1.

Director's assessment, then, the record does not ''evince an intent to poll,'' *but* instead evinces an intent not to poll.

I find the Regional Director's reliance on *Weise* and *Macklanburg-Duncan*, supra, to be unpersuasive. In *Weise*, the employer's president told employees at various preelection meetings that he would be wearing a vote no badge, that the badges were available for everyone to wear, and that the employees could take one of the badges as they left the meeting, if they wished to do so. The employer also instructed its supervisors to wear the vote no badges and to give one to anyone who requested it.

In a decision devoid of any substantive factual analysis, the Board agreed with the Regional Director's finding that by making the badges available to the employees, even without urging them to wear them, the employer was ''in effect'' providing a means by which employees would be placed in a position of making an open declaration of preference—i.e., employees who accepted and wore the badges would be expressing an overt antiunion preference, while employees who refused to accept or wear the badges would be expressing a prounion sentiment, or would ''at the least [fail] to indicate an anti-union sentiment.'' Thus, the Regional Director concluded, and the Board agreed, that by making the badges available, the employer prevented the employees from freely expressing their choice. Indeed, the Board went further than the Regional Director and found that by making the campaign material available under the above conditions, the employer had placed the employees in the same position of declaring their union preference as they would have been in by being *directly interrogated* by the employer about their union preferences.

In *Macklanburg-Duncan*, all supervisors wore proemployer/antiunion buttons and T-shirts during the critical period prior to the election. They also kept a supply of the buttons on their desks, where employees could readily obtain them. When employees asked supervisors how they could get a T-shirt, the supervisors told them that they could order one for 5 cents.

In a decision relying on, inter alia, *Weise*—and like *Weise*, bereft of any substantive factual analysis—the Board agreed with the Regional Director's conclusion that by making the buttons and T-shirts readily available to the employees, ''the Employer forced employees to express their union preferences.'' The Board added that the facts showed that the employer was not merely using its supervisory personnel in furtherance of its campaign, but that it intended to make the antiunion materials available to employees, who by electing whether or not to wear them, would disclose their choice.

Significantly, however, for purposes of analysis of the instant case, the Board in *Macklanburg-Duncan* distinguished an unpublished Board decision, *Aero Commander*, on the grounds, inter alia, that the employer's distribution of vote no cards to supervisors in that case (where several employees subsequently took such cards from supervisors' pockets) occurred under conditions (not further described by the Board) consistent with ''a lawful exercise of an Employer's right to utilize supervisory personnel as media for publication of antiunion propaganda.'' The Board found that there was no evidence in *Aero Commander* that the employer intended to exceed this area of legitimate activity, as ''the cards were not distributed in quantities or under conditions suggesting that the Employer intended or had reasonable basis for belief that possession of the cards by supervisors would place employees in a position of declaring themselves as to union preference.'' I find the analysis applied in distinguishing *Aero Commander* to be most applicable to the situation presented in the instant case, and not the broad, summary language applied in finding objectionable conduct in *Weise* and *Macklanburg-Duncan*.

In any event, the precedential and persuasive value of these two decisions has, in my view, been significantly undermined by more recent decisions in this area.

In *Farah Mfg. Co.*, 204 NLRB 173, 175–176 (1973), the Board found that the employer did not violate Section 8(a)(1) of the Act by distributing procompany/antiunion badges to employees during the union's organizational campaign. A supply of these badges was placed in a box in the front office near a window opening onto the front corridor of the plant, where they were available for supervisors as well as employees to take. In finding that the employer did not violate the Act, the Board fully affirmed the following reasoning of the administrative law judge:

> [A]ll Respondent did regarding the . . . badges, so far as this record shows, was to make them available and to allow their use by any employee, whether rank-and-file or supervisor. The complaint alleges even this was a violation of Section 8(a)(1) because it forced employees to make an open choice between the Company and the Union. Clearly the legend on the badge . . . reveals a preference by those who wore it for the Company as against the Union. An employer who pressures employees to such a choice commits an unfair labor practice. *Garland Knitting Mills of Beaufort, South Carolina, Inc.*, 170 NLRB 821, enfd. in pert. part 414 F.2d 1214, fn. 4 (C.A.D.C., 1969). The question here is whether Respondent pressured any employee . . . to make that choice when all it did was [to] provide a supply of badges at a central location. I find that it did not.

In *McDonald's*, 214 NLRB 879, 881–883 (1974), the Board majority found that the employer did not

violate Section 8(a)(1) of the Act by making vote no pins available to the employees during the week before the date set for the subsequently canceled election. Management personnel wore such pins and generally had additional pins handy to give to employees. Further, pins were left at several places on the premises, including a table and a bulletin board near the timeclock, where they would be readily accessible to employees. In finding that the employer did not violate the Act, the Board majority fully affirmed the following reasoning of the administrative law judge:

> On the basic view that an employee's acceptance or rejection of a tendered ''Vote No'' button necessarily constitutes a declaration of his position, it is difficult to see how making the buttons prominently available at central locations does not similarly amount to subtle interrogation, particularly when supervisors are prominently wearing buttons.
>
> The Board, however, has apparently eschewed a *per se* rule prohibiting employers' distributing ''Vote No'' buttons or similar material [citing *Farah*, supra]. . . . [T]he Board did conclude in *Jefferson* [*Stores, Inc*., 201 NLRB 672 (1973)] that: ''Where, as here, the distributed material and the manner in which it is distributed, unaccompanied by threats or promises of benefits, is not coercive, there is no interference with the election.'' And, as previously noted, *Farah* requires employer ''pressure'' for a violation. While it is not entirely clear analytically how the absence of ''threats or promises'' or ''pressure'' negatives the ''interrogative'' effect of the distribution,[10] I understand *Farah* and *Jefferson* as teaching that the distribution of such graphic materials for display by employees does not contravene Section 8(a)(1) if the distribution is unaccompanied by ''coercive'' conduct.

[10] Whatever the employer's intention, the creation of a situation in which the employees' conduct will necessarily tend to indicate his views might be seen as inherently ''coercive.''

In *Black Dot, Inc*., 239 NLRB 929 (1978), which the Regional Director in the instant case found to be distinguishable, the Board relied on *Farah* and *McDonald's*, supra, distinguished *Weise* and *Macklanburg-Duncan*, supra, and found that the employer did not engage in objectionable conduct by making proemployer and antiunion buttons available to employees. On three occasions during the month preceding the election, the employer placed proemployer and antiunion buttons in a flowerpot that was hung on a wall in the employee cafeteria. Also on the wall was a large red paper arrow pointing down toward the bucket of buttons. Before the buttons were made available, the employer instructed its supervisors not to discuss the buttons with employees. There was no evidence that supervisors participated in the distribution of the buttons.

In finding no objectionable conduct, the Board found that on the basis of the entire context of the organizational campaign, the mere availability of buttons did not warrant setting aside the election. The Board distinguished *Weise, Macklanburg-Duncan*, and two other cases,[8] on the grounds that in *Black Dot* there was no involvement by supervisors in the button distribution process, which was also unaccompanied by any coercive conduct. The Board found that supervisors did not pressure employees to make an open choice between the company and the union, but rather that the employer merely provided a supply of buttons at a central location (citing *Farah*, supra).[9]

In *Wm. T. Burnett & Co*., 273 NLRB 1084, 1092–1093 (1984), the Board found that the employer did not violate the Act or engage in objectionable conduct when one of its supervisors spontaneously tossed an antiunion button onto a table in front of two employees. Although the facts in *Burnett* are thus different from those in the instant case (the Board affirmed the administrative law judge's dismissal of the allegation in *Burnett* on the grounds that the above incident was ''essentially isolated and noncoercive''), the judge's reasoning, fully affirmed by the Board, is nevertheless equally applicable to the instant case:

> [T]he distribution of antiunion material by an employer is not unlawful in itself absent some form of coercion or pressure on an employee to receive the material [citing *Farah* and *McDonald's*]. . . . If [supervisor] McCall had been inclined to cause [employee] Bunton to declare his union sympathies, it is more likely that he would have offered the button directly to Bunton rather than flipping it on a table where it was accessible to another employee, Mayberry. Bunton could have left the button where it lay without in any way indicating his union intentions.

Finally in this context, the Board found in *Schwartz Mfg. Co*., 289 NLRB 874, 879 (1988), that the employer did not violate Section 8(a)(1) of the Act when, during a union organizational campaign, a nonsupervisory employee distributed hats affixed with the company logo and vote no buttons to employees who

[8] *Pillowtex Corp*., 234 NLRB 560 (1978), and *Borg-Warner Corp*., 229 NLRB 1149 (1977).

[9] I do note that as additional support for its conclusion in *Black Dot* that the mere availability of buttons under those circumstances would not reasonably tend to interfere with the employees free choice, the Board also noted that, in response to a union mailing, the employer distributed literature to the employees that assured them that wearing or not wearing a button was a strictly personal and voluntary act which would in no way affect any employee favorably or unfavorably.

were still assembled in the lunchroom immediately following a meeting of these employees conducted by management. During the meeting, management had urged the employees not to vote for the union and had encouraged them to take and wear the vote no hats. Although no management officials were present in the lunchroom at the time the hats were being distributed immediately following the meeting, they were present in the area outside the lunchroom when one of the first employees left the lunchroom.

In dismissing the allegation, the Board found that the evidence failed to reveal any direct involvement by supervisors in the distribution process or any evidence that supervisors engaged in open surveillance of employees leaving the lunchroom. Under those circumstances, the Board, relying on *Farah, McDonald's*, and *Black Dot*, found that the central availability of procompany insignia did not reasonably tend to interfere with employee rights under the Act, where there was no supervisory involvement in the distribution process or other evidence that management pressured employees into making an observable choice or open acknowledgment concerning their campaign position.

I recognize, of course, that the above cases—like most precedent—is not squarely on all fours with the facts in the instant case. The supervisors here did play a role, albeit a passive one, in making the buttons and stickers available to the employees.[10] Nevertheless, I find that the underlying rule that supports the dismissals in the precedent cases is applicable to and controlling in the instant case as well: Merely making proemployer and antiunion buttons and stickers available to employees, without any accompanying coercive conduct, does not in itself constitute objectionable conduct warranting the setting aside of an election.

In light of all of the above considerations, I would overrule Objection 1.

2. Objection 3

In Objection 3, the Union alleges that two employees paraded through a work area while wearing ''radically provocative'' head gear, with an antiunion message on it; that they were encouraged in this escapade by a supervisor; and that pictures of these two employees, so adorned, were distributed and shown throughout the plant. The Union asserts that on the basis of all the alleged objectionable conduct (including, but not only, the conduct in question in Objection 3), the election was not held in an environment free of ''prejudices'' or within the law.

As accurately described by the Regional Director based on a photograph in the record, the two employees in question were wearing white head coverings that completely covered their faces, dark sunglasses, and hardhats. The words ''VOTE NO'' were written on the face covering of one employee, and the words ''OR ELSE'' were written on the other. During working time, and while disguised in this way, the two employees walked through the maintenance shop and into the instrument shop. They were accompanied by a relief foreman, and observed by at least two other employees. Another employee photographed the employees with a company-owned instant camera, obtained by the employee from the office of a maintenance planner, without permission from the Employer. The photographs were shortly thereafter posted on an employee bulletin board normally used for the posting of employees' personal pictures (not the separate bulletin board that is reserved for the posting of company notices to employees). Two of the photographs remained posted for about a week, and they were observed by several employees during that period.

In recommending an evidentiary hearing on Objection 3, the Regional Director noted that there were substantial and material issues of fact in regard to whether the Employer was responsible for the above conduct and whether the conduct created an atmosphere of fear of reprisal.

The Union has not filed exceptions, a response to the Employer's exceptions, a statement in support of the Regional Director's report, or a statement in support of its objections. Even without guidance from the Union, however, I think, based on the totality of the circumstances related to Objection 3, and the reference to prejudices in the Union's one-page statement of objections, that the term ''radically'' in the Union's statement of objections is a typographical error, and that the Union means to say that the conduct in question in Objection 3 is racially provocative. Any question about the Union's intent will, of course, be resolved at the hearing.

If the Union is, however, alleging that the conduct in question is racially provocative, then to support this allegation the evidentiary record developed at the hearing should include evidence material to the question of whether this conduct was calculated to inflame any racial prejudice of employees, or whether it deliberately sought to overemphasize and exacerbate racial feelings.[11]

[10] But I agree with the Employer's argument that (contrary to the position apparently taken by the Regional Director) the supervisors' mere placing of quantities of buttons and stickers at one end of a table, even in the presence of assembled employees, does not constitute the potentially coercive ''supervisory involvement in the distribution process'' found in cases where supervisors hand out such materials individually and directly to employees. And even in such a one-to-one distribution situation, I will continue to look at the totality of the surrounding circumstances in determining whether employees have been interfered with in the exercise of their rights. See *Gonzales Packing Co.*, 304 NLRB 805 (1991), and my dissent there.

[11] See generally *Sewell Mfg. Co.*, 138 NLRB 66 (1962); sec. 24-323 (Racial Appeals), Board's Outline of Law and Procedure in Representation Cases.

APPENDIX

Objection 1, i.e., the alleged polling of employees: By this objection, the Petitioner objects to the distribution of vote no buttons and vote no decals to employees by the Employer during the critical period prior to the election. The Employer's employee relations manager William R. Herrington testified that on or about September 2, 1992, the Employer sent a supply of vote no buttons and vote no decals to each of 30 supervisors. Each supervisor received an interoffice envelope which contained the buttons and decals and a memorandum setting forth instructions on how the buttons and decals were to be distributed. A copy of the memorandum is attached hereto as attachment B. Among the supervisors who received the buttons, decals, and memoranda were Maintenance Supervisors Van Wells, Hal Rieves Sr., Jim Harlow, and Arthur Danner.

Supervisor Wells testified that after he received his envelope, he engaged the members of his maintenance crew and told them to meet him in the employees' breakroom. He stated that after the eight members of his crew arrived in the breakroom, he placed his supply of buttons and decals on a table there and told the members of his crew, ''There are some buttons and stickers; if anybody wants more, I can get them.'' Wells testified that he then walked out of the breakroom. He stated that he could not recall whether or not he was wearing a vote no button or a vote no decal at the time that he met with his crew. Only Wells and the eight members of Wells' crew were present in the breakroom on this occasion. An employee witness testified that two members of Wells' crew took buttons and decals.

Supervisor Rieves testified that about 1 week prior to the election, he went into the employees' breakroom where members of his maintenance crew were seated. There are eight members of Rieves' crew. Rieves stated that he dumped the buttons and stickers on a table in the presence of crewmembers and said, ''Here are some buttons if anybody wants one.'' He testified that he then left the breakroom. Rieves was wearing a vote no button on his shirt at the time that he placed the buttons and decals on the breakroom table. Rieves testified that about a week prior to delivering the buttons and decals to the breakroom, a member of his crew noted that Rieves was wearing a vote no button and asked Rieves why he (the crewmember) could not have one. Rieves testified that he told this employee that he would have to ''see about it.'' One employee witness testified that two members of Rieves' crew wore vote no buttons, while a second employee witness testified that he recalled only one crewmember wearing a vote no button.

Supervisor Harlow testified that after receiving his supply of buttons and decals he want into the breakroom while the members of his crew were taking a break. Only Harlow and the 10 members of his crew were present. The crewmembers were seated at two tables which had been pushed together end to end. He placed the buttons and decals at one end of the two-table arrangement and then turned to leave the breakroom. He testified that as he turned, a crewmember made a joking comment. He said that he could not recall what the crewmember said. Although Harlow testified that he made no comments on this occasion, a member of Harlow's crew testified that Harlow stated, ''Here are some buttons for the people that want them.'' Harlow was wearing a vote no decal on his hardhat at the time he delivered the buttons and decals. An employee witness testified that two members of Harlow's crew took vote no buttons and wore them.

Supervisor Danner testified that he went into the breakroom while members of his crew were present. He stated that he placed his supply of buttons and decals on a table located away from the area where members of his crew were seated. He testified that he made no remarks at the time that this occurred. He gave uncontradicted testimony that he was not wearing a vote no button or a vote no decal on this occasion. There are eight members of Danner's crew.

There is no contention that Wells, Rieves, Harlow, or Danner remained in the breakroom in order to observe whether any employee picked up a button or a decal. Some maintenance employees wore prounion stickers and buttons prior to the distribution of vote no buttons or vote no decals.

In support of its contention that this objection lacks merit, the Employer relies on the Board's decision in *Black Dot, Inc*., 239 NLRB 929 (1978). In *Black Dot*, the employer placed proemployer and antiunion buttons in a flowerpot that was hung on a wall in the employees' cafeteria. There was no evidence in that case that supervisors participated in the distribution of the buttons. In concluding that the employer's conduct did not constitute a basis for setting aside the election, the Board found that the facts of the case were distinguishable from those in *Macklanbury-Duncan Co*., 179 NLRB 848 (1969); and *Chas. V. Weise Co*., 133 NLRB 765 (1961). In *Macklanburg-Duncan*, there was undisputed evidence that during the critical period supervisors placed proemployer and antiunion buttons on their desks where employees could readily obtain them. The supervisors wore the buttons and T-shirts which contained proemployer propaganda. When employees asked how they could obtain a T-shirt, they were informed that one could be ordered for five cents. In finding that the employer's conduct constituted a basis for setting aside the election, the Board concluded that ''the Employer was not merely utilizing the supervisory personnel in furtherance of its campaign, but intended to make the anti-union materials available to employees who, by electing whether to wear them, would disclose their choice.'' In *Weise*, the employer's president, during the course of meetings, told employees that he would be wearing a vote no badge and that such badges would be available for employees to wear if they wished to have one. Supervisors furnished the badges to employees who requested them. The Board, on consideration of the facts, found that the employer ''placed the employees in the position of declaring themselves as to union preference just as if they had been interrogated as to such preference, and thereby interfered with the free and untrammeled choice of the employees.''

Here, as in *Macklanburg-Duncan* and *Weise*, there is direct supervisory involvement in the distribution of antiunion materials which called on employees to openly display a preference. Such supervisory involvement consisted of admitted Section 2(11) supervisors appearing individually before the members of their own small work crews. In some instances this occurred on working time. The crewmembers were known personally to the supervisors and knowledge of which crewmembers accepted and which did not accept the offer of the materials could become readily known to the supervisors. This evinced an intent to poll. In these circumstances, I find that the facts here are distinguishable from

those in *Black Dot*. Accordingly, it is found that the Employer's reliance on *Black Dot* is misplaced.

In view of the facts in the instant case, I find merit to this objection. *Macklanburg-Duncan Co*., supra.

Accordingly, it is recommended that Petitioner's Objection 1, i.e., the alleged polling of employees, be sustained.

. . . .

As noted here, I have found that Objection 3 raises substantial and material factual issues which warrant hearing. In the event the Board should find that Objection 1 raises material issues of fact which warrant a hearing, then it is recommended that a hearing be directed on both Objection 1 and Objection 3. If the Board should find that Objection 1 should be overruled, then it is recommended that a hearing be directed on Objection 3 alone.

ATTACHMENT B

INTERNAL CORRESPONDENCE

To: Distribution **Date**: September 2, 1992
From: M. W. Merrill
Ext. 8502
Subject: ''Vote No'' Buttons and Decals

I have provided Vote NO! buttons and hard hat decals for you to wear during this union campaign. I am also providing them for the members of your crew who may want them. It is important, however, that you know how these are to be distributed.

As a group, you should tell your crew that these materials are available for those employees who may want them. This should be done in a neutral area such as a control room or lunchroom, not in your office. YOU SHOULD NOT HAND THEM TO YOUR EMPLOYEES as his could be viewed to be polling and coercive behavior. After making them available to the group you should NOT closely monitor who picks the materials up and who does not. Simply make them available.

Extra decals and buttons are available in Bill Herrington's office if you need more.

Each of you has done a fine job of getting the real message to your employees and I appreciate it. Keep up the good work.

Distribution

T. L. Barnes	W. C. Jaudon
P. H. Bibbs	J. C. Magyar
D. B. Colbert	R. D. Minga
M. S. Clay	L. E. Motes
J. R. Crump	J. B. Perkins
A. L. Danner	G. C. Pickle
L. H. Duncan	B. W. Pruett
W. G. Fields	H. H. Rieves
R. C. Flake	C. L. Roane
J. R. Gilliland	R. J. Tubb
M. E. Gran	V. B. Wells
O. E. Hammermeister	J. B. Wood
J. A. Harlow	G. D. Wootten
J. J. Holsonback	T. J. Wozniak
L. L. Howell	W. E. Young